

Commonwealth of Kentucky
Supreme Court

No. 2015-SC-000180-DR

DARRYL M. SAMUELS

APPELLANT

Appeal from Court of Appeals
No. 2012-CA-00031-MR
Appeal from McCracken Circuit Court
Hon. Craig Zeiss Clymer, Judge
Indictment No. 08-CR-377

v.

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for the Commonwealth

Submitted by,

ANDY BESHEAR

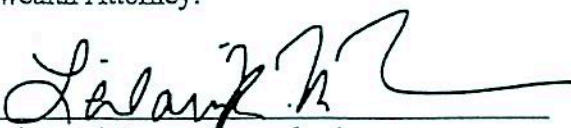
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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served 13 May 2016 as follows: by mailing via postal mail to Honorable Craig Zeiss Clymer, Judge, McCracken Circuit Court, 301 South 6th Street, Paducah, Ky. 42003; via messenger mail to Hon. Brandon Neil Jewell, 5 Mill Creek Park, Section 100, Frankfort, Ky. 40601 and by sending electronic mail to Hon. Dan Boaz, Commonwealth Attorney.


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INTRODUCTION

Appellant successfully petitioned this Court for discretionary review of the Kentucky Court of Appeals opinion that affirmed the trial court's determination that the mere fact of two (2) DPA attorneys sharing an office when one attorney had represented the victim in the past and the other attorney was presently representing Appellant at trial, but neither DPA attorney had discussed either client with one another, was, by itself, not sufficient for a conclusion that there a conflict of interests for Appellant's present DPA trial attorney, as he failed to show actual prejudice.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary, but is prepared to participate in oral argument if it is deemed necessary by this Court.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

Appellant was indicted on September 12, 2008 in McCracken Circuit Court for assault in the second degree. (TR, "Indictment No. 08-CR-00377", pp. 1-2). He was convicted of assault in the second degree by a jury trial conducted on May 20, 2009. (TR, "Instructions to the Jury, Verdict Form No. 1", p. 96). The jury fixed his punishment at ten years in the penitentiary. (TR, "Instructions to the Jury, Verdict Form No. 1", p. 101). Appellant was sentenced to ten (10) years imprisonment on July 23, 2009. (TR, "Final Judgment/Sentence of Imprisonment", pp. 104-106).

Christopher Gravett testified that he was an inmate at the McCracken County Jail on July 9, 2008. He stated that Appellant had a bunk next to him, and that Appellant had a hygiene problem that caused him to "stink." He otherwise had no problems with Appellant. He asked Appellant to bathe and offered him soap and deodorant, but Appellant declined. (VR Trial, 5/20/09; 11:56:42-11:59:30). Gravett testified that during the early morning hours, he was playing cards with John Avery and Brian Ingram. Gravett went to lay down on his bunk, and found Appellant's body odor to be bad, and asked him to take a shower. Appellant declined. Gravett went back to playing cards, but then went back to Appellant's bunk and lifted the bunk a little bit. Appellant then jumped up and hit Gravett. (VR Trial, 5/20/09; 11:59:50-12:00:48).

Gravett testified that Appellant hit him in the mouth at first, and then hit him again. Appellant then started to hit him in the back of the head. Gravett stated that he did not return punches and told Appellant "I'm done." Appellant then grabbed Gravett and bit his ear off. Appellant began to yell "Where am I from?" and "Memphis." Appellant got up on a table and threw his arms up in the air. Gravett went to inmate John Avery's room.

Meanwhile, Appellant had spat Gravett's ear out onto the ground. (VR Trial: 5/20/09; 12:01:32-12:04:50).

Gravett testified that he was taken to a local hospital, then to the University of Louisville Hospital. He required a total of thirteen and one-half (13.5) hours of surgery. His second surgery was a skin graft. He was hospitalized for ten (10) days. He testified that he would need more surgery in the future. He identified Commonwealth's Exhibit Number 1, a picture of the left side of his head showing the area of injury. (VR Trial: 5/20/09; 12:05:59-12:07:35). Gravett testified to his constant pain and infections because his ear would not drain well. (VR Trial: 5/20/09; 12:15:10-12:15:35). Gravett testified on cross examination that he had no prior troubles with Appellant, but admitted that he was unpleasant about his interaction with Appellant. He stated that he had recovered his hearing. (VR Trial: 5/20/09; 12:18:30-12:22:40).

John Avery testified that he was an inmate at the McCracken County Jail on July 9, 2008, and that he observed the incident between Appellant and Gravett. He testified that he was playing cards with Gravett and Brian Ingram, when Gravett left to go to his bed. He testified that Gravett told Appellant to take a shower, moved away, and then asked Appellant to take a shower or move. He testified that Gravett then picked up Appellant's bunk, and Appellant "came up." A scuffle occurred, and Gravett said "I'm done." Appellant then jumped on Gravett, beat him, and bit his ear off. Ingram pulled Appellant off, and Avery put a rag on Gravett's ear. Appellant said, "I'm from Memphis, bitch", and ran "victory laps" and got on top of a table like the "Rocky" character, with his arms in the air. (VR Trial: 5/20/09; 13:46:03-13:50:40). On cross examination, Avery

acknowledged that there was no issue that Gravett had “instigated” the matter. (VR Trial: 5/20/09; 13:52:40).

Inmate Royce Wattlington testified that he was in the McCracken County Jail on July 9, 2008. He heard an inmate say that someone had bitten an ear off. He saw Ingram try to pull Appellant off of Gravett and saw Appellant spit Gravett’s ear out on the ground. (VR Trial: 5/20/09; 13:58:40-13:59:31).

McCracken County Sheriff’s Office Detective Tom Emery (“Detective Emery”) testified that he interviewed Appellant in the course of his investigation of the incident. He testified that Appellant told him that he was asleep when Gravett kicked his shoe and his bunk, that he got up, and that Gravett swung at him first. He acknowledged biting Gravett’s ear off, and when asked if that was necessary, Appellant replied that it was not. (VR Trial: 5/20/09; 14:02:45-14:06:20). On cross examination, Detective Emery testified that Appellant said he was trying to protect himself. (VR Trial: 5/20/09; 14:13:05).

Dr. Phillip Anderson testified that he saw Gravett as a patient on July 9, 2008. Gravett was missing his left ear. He needed plastic surgery, and was transferred to the University of Louisville Hospital. Dr Anderson testified that the ear is considered an “organ”, and that Gravett suffered serious and prolonged disfigurement, as well as prolonged loss and impairment of an organ. (VR Trial: 5/20/09; 14:14:04-14:21:53).

Appellant did not call any witnesses.

Appellant appealed to the Kentucky Court of Appeals. The Court of Appeals remanded the case to the trial court because the audio of the pretrial conflict hearing in the judge’s chamber was “almost inaudible.” It ordered that the trial judge conduct a

hearing to determine if there was a conflict of interest, notwithstanding the inaudible hearing that had already occurred. Samuels v. Commonwealth, 2009-CA-1420, rendered March 11, 2011, TR Belated Appeal, 1-3.

The trial court hearing on remand was held on September 23, 2011. At that hearing, agreement was reached between the Commonwealth and Appellant about the specifics of the representation of Appellant, the victim and the inmate witnesses by the Paducah Office of the Department of Public Advocacy. (VR 9/23/11; 15:58:57). This was evidenced by both testimony of some of the attorneys involved and court documents filed into the hearing record, Commonwealth's Hearing Exhibits 1-8.

Afterwards, the Commonwealth and Appellant provided legal memoranda to the trial court supporting their positions, and after considering the hearing and the memoranda, the trial judge issued his ruling that there was no conflict of interest in the case. (TR Belated Appeal, "Order on Remand from Court of Appeals (As to 'Conflict of Interest' Issue),"40-46).

Appellant appealed again to the Kentucky Court of Appeals, which resulted in the to-be- published case of Samuels v. Commonwealth, 2015 WL 1120329, which is presently not published due to the action at bar. This Court of Appeals opinion acknowledged that Gravett and Appellant have adverse interests, but relied upon the facts from the 23 September 2011 hearing to determine whether these interests were merely implied without any prejudice. It stated:

[W]e must look at Appellant's individual case to determine whether his counsel had an actual conflict for the purpose of the Sixth Amendment. The facts adduced at the remand

hearing were clear that Keeley never represented Gravett, knew nothing about the details of his case, and had no duty to loyalty to him directly. Likewise, Johnson had never worked on Appellant's case, knew nothing about the details of his case, and owed no duty or loyalty directly to Appellant.

The facts show that two [2] different DPA attorneys working independently of one another happened, for a period of time, to represent both the victim, Gravett, and the Appellant. Without a showing that the two [2] collaborated or were involved in each other's cases during the relevant time period, we do not believe that the mere fact that they both worked for DPA is sufficient to prove that an actual conflict of interest existed under the Sixth Amendment. It is for this reason that we affirm the trial court's ultimate conclusion.

(See Slip Opinion, page 17) These facts were the determinative ones underlying the Court of Appeals ultimate decision to affirm the trial court's ruling, and it applied Beard v. Commonwealth, 302 S.W.2d 643 (Ky.2010) (*holding that there are two different standards for evaluating a Sixth Amendment claim, depending on whether the claim was brought before trial or at post conviction*), and Holloway v. Arkansas, 435 U.S. 475 (1978) (*instructing that if the Sixth Amendment challenge is brought at or before trial, only a conflict of interest need be shown without showing prejudice or impact on counsel performance*). (Id., page 7-8)

Additional facts may be developed throughout this brief as necessary.

I.

THE COURT OF APPEALS DID NOT COMMIT ERROR IN AFFIRMING THE TRIAL COURT'S DETERMINATION THAT APPELLANT'S TRIAL COUNSEL DID NOT HAVE A CONFLICT OF INTEREST

On the morning of trial before jury selection commenced, a pretrial hearing was conducted in chambers. The Commonwealth agrees with Appellant that the sound quality of this hearing is poor, at best, and much of what is said cannot be discerned.

However, from what could be heard, the Commonwealth proffers the following. The judge began by stating that Appellant had an issue regarding his trial attorney, Ms. Keeley, having represented a potential prosecution witness. Appellant nodded his head to indicate that he was aware of that matter. (VR Trial: 5/20/09; 8:45:31-8:46:10). Ms. Keeley stated that she believed the victim in the case was still represented by the Department for Public Advocacy (DPA), but had not checked his status lately. The judge stated that the victim was not represented by Ms. Keeley, and asked Appellant if he understood that. Appellant's response was unintelligible, and he pointed to a document. Ms. Keeley gave the document to the judge, stating it was for the record. While this document was not marked as an exhibit, it is contained in an exhibit envelope in this Court's record on appeal. (VR Trial 5/20/09; 8:46:11-8:46:52). A copy of this document is attached as an exhibit to Appellant's brief in the Appendix. The document is dated April 13, 2009 and reads,

April 13, 2009

I, Darryl Samuels, am represented by the Paducah Trial Office of the Department of Public Advocacy. My assigned attorney from that office is Carolyn Keeley. I am awaiting trial on McCracken Circuit Court on Indictment No. 08-CR-0000377 for Assault 2nd. The victim in that case is Christopher Gravett. I am aware that the Paducah Trial Office has represented Gravett on numerous occasions. Most recently, Gravett was sentenced on April 8, 2009 in McCracken Circuit Court. His attorney was John Johnson, another attorney in the Paducah Trial Office of the Department of Public Advocacy. In addition, I am aware that at least two of the prosecution witnesses were represented by Carolyn Keeley. Because the incident occurred at the McCracken County Jail, some or all potential witnesses will have been clients of the Paducah trial office. The actual facts of the case are not at issue. My defense is either self defense or that I was acting under extreme emotional disturbance. I have no objection to being represented by Carolyn Keeley, an attorney with the Paducah Trial Office of the Department of Public Advocacy.

Darryl Samuels

Underneath this text and the signature line, was written, "I refuse to waive, Darryl Samuels".

Ms. Keeley stated that a DPA attorney, "Mr. McNeil", determined that there was no conflict of interest in the case, but she wanted to disclose the information about DPA representation of Gravett to Appellant. (VR Trial: 5/20/09; 8:47:10-8:47:35) The judge asked Appellant if he believed that if some other DPA attorney represents the victim that it would affect his case if Ms. Keeley was his counsel. Appellant appears to indicate that it would, as the judge asks him, "In what way?" Appellant makes an unintelligible reply. Ms. Keeley makes a statement, which also is partially unintelligible. The judge then states that "Well, we've got that on the record." He states that there is no conflict with Ms.

Keeley representing Appellant, and that she is a good attorney. (VR Trial: 5/20/09; 8:47:37-8:48:40).

For purposes of the remand hearing, the Commonwealth and the Appellant's trial counsel agreed on the following time line regarding Paducah DPA activity concerning people connected to this case:

4/20/07	Gravett indicted in 07-CR-218, fraudulent use of a credit card, theft of identity (represented by Paducah DPA - Audrey Lee)
7/05/07	Gravett guilty plea in 07-CR-218 (represented by Paducah DPA - Audrey Lee)
8/27/07	Gravett sentencing in 07-CR-218 (represented by Paducah DPA - Audrey Lee)
6/30/08	Gravett first probation revocation in 07-CR-218 (represented by Paducah DPA - Sarah Steele)
7/03/08	Samuels' preliminary hearing in McCracken District Court on other charges (would eventually become 08-CR-324)(Paducah DPA appointed)
7/09/08	Assault occurs in the McCracken County Jail involving the Appellant and Gravett (the instant case)
8/08/08	Samuels indicted in 08-CR-324, rape in the first degree
9/12/08	Samuels indicted for assault in 08-CR-377 (the instant case) TR 1-2
9/19/08	Samuels motion for psychological examination filed in 08-CR-377 & 08-CR-324 (filed by Paducah DPA - Carolyn Keeley) TR 4-5
1/05/09	Gravett's second probation revocation hearing in 07-CR-218 (represented by Paducah DPA - John Johnson)
1/09/09	Gravett indicted in 09-CR-008, promoting contraband, PFO second degree (represented by Paducah DPA - John Johnson)
1/20/09	Samuels pleads guilty in 08-CR-324 - rape in the first degree, (represented by Paducah DPA - Carolyn Keeley)

3/18/09 Samuels is sentenced in 08-CR-324 - twelve years, rape in the first degree, (represented by Paducah DPA - Carolyn Keeley)

4/07-09/09 Gravett pleads guilty and is sentenced in 09-CR-008 (represented by Paducah DPA - John Johnson)

5/08/09 Gravett Motion for shock probation filed in 07-CR-218 and 09-CR-008 (represented by Paducah DPA - John Johnson)

5/12/09 Gravett motion for shock probation is denied in 07-CR-218 and 09-CR-008

5/20/09 Samuels' assault trial in 08-CR-377 (represented by Paducah DPA - Carolyn Keeley) (the instant case)

(Commonwealth's Exhibit Nos. 2, 3; TR Belated Appeal, "Commonwealth's Memorandum Regarding the 'Conflict of Interest' Evidentiary Hearing," 18-32; TR Belated Appeal, "Defendant's Memorandum Regarding the 'Conflict of Interest' Evidentiary Hearing," 33.)

Although Appellant has affirmatively abandoned any conflict issues besides those that pertain to Appellant and Gravett for the purposes of this discretionary review before the Court, to provide a complete picture, the following is the time line agreed upon below for DPA's representation of both Brian Inghram and John Avery.

1/04/08 Avery indicted in 08-CR-004, sex offender registry offenses (represented by Paducah DPA - initially Todd Jones)

2/08/08 Inghram preliminary hearing on 08-F-119 (represented by Paducah DPA - Carolyn Keeley)

2/22/08 Avery is indicted in 08-CR-074, registered sex offender offense (represented by Paducah DPA - initially Todd Jones)

4/07/08 Avery enters guilty plea in 08-CR-004 and 08-CR-074 (represented by Paducah DPA - Carolyn Keeley)

6/26/08 Inghram pleads guilty to misdemeanor theft charges in District Court (represented by Paducah DPA- Carolyn Keeley)

8/25/08 Avery files shock probation motion in 08-CR-004 and 08-CR-074 (motions are filed by Paducah DPA - Carolyn Keeley)

9/02/08 Avery's shock probation motions in 08-CR-004 and 08-CR-074 are denied (Commonwealth's Exhibits 1, 4, 5; TR Belated Appeal, "Commonwealth's Memorandum Regarding the 'Conflict of Interest' Evidentiary Hearing," 22 - 23; TR Belated Appeal, "Defendant's Memorandum Regarding the 'Conflict of Interest' Evidentiary Hearing," 33.)

The first agreed-upon time line shows that DPA represented Gravett on two (2) cases that both unrelated to Appellant's case. DPA counsel other than Ms. Keeley represented Gravett in case 07-CR-218 from April 20, 2007 through May 12, 2009, and DPA counsel other than Ms. Keeley represented Gravett in case 09-CR-008 from January 9, 2009 through May 12, 2009. The May 12, 2009 date represents the date that Gravett's motions for shock probation were overruled in both of his cases, concluding the representation of Gravett by DPA eight (8) days before Appellant's May 20, 2009 trial for assaulting Gravett.

The time lines show that Ms. Keeley herself represented Appellant from August, 2008 through his January 20, 2009 guilty plea in case 08-CR-324, a rape in the first degree case. Ms. Keeley, of course, also represented Appellant in this case, 08-CR-377, beginning as early as filing motions on his behalf on September 19, 2008, and through trial on May 20, 2009.

At the remand hearing, Ms. Keeley testified that she had thirteen (13) years of attorney experience with DPA and has practiced law for twenty years. (VR 9/23/11; 15:42:35-15:43:20). She was "reasonably certain" there was no conflict. (VR 9/23/11; 15:52:30). She believed that she should exercise caution in this case, so she prepared the

waiver for Appellant, spoke to her supervisor, Chris McNeill, and sought a ruling on the conflict issue from the trial judge. (VR 9/23/11; 15:56:00-15:56:57).

Chris McNeill, the directing attorney for the Paducah DPA office, testified at the remand hearing. He had been with DPA for ten (10) years, eight (8) as a directing attorney, and has practiced law since 1998-99. (VR 9/23/11; 15:15:30-15:16:05). He discussed this case with Ms. Keeley, and concluded that there was no conflict. (VR 9/23/11; 15:16:15-15:18:15; 15:22:00-15:23:05).

Following the remand hearing, the trial court ruled that:

In the case at bar, we have other attorney's (sic) from the Paducah DPA previously representing a client, Mr. Gravett, who later was an adverse victim witness in a trial, wherein the Defendant was represented by a different attorney from the Paducah DPA. Therefore, this case is the type of case referenced by the Beard court, wherein "the defense counsel has only previously represented an adverse witness." (Footnote omitted).

Mr. Gravett was not an informant for the police, nor did he have an interest in the outcome of the trial such that it could later affect his own proceedings. In fact, Mr. Gravett had no other pending proceedings. In Mr. Gravett's motion for Shock Probation, filed by Mr. Johnson of the Paducah DPA, no mention was made of the injuries from the Defendant. No mention was made of Mr. Gravett's potential testimony at the upcoming trial or cooperation with law enforcement or the prosecution.

At the Evidentiary Hearing, no showing was made that Ms. Keeley was unable to give her best representation to the Defendant. No showing was made that Ms. Keeley took steps to or omitted actions that would have helped either the Defendant or Mr. Gravett. No complaint has been made at her attempts to cross-examine Mr. Gravett at the Defendant's trial. No complaint has been made that Ms. Keeley revealed confidential information about either the Defendant or Mr. Gravett. No showing has been made that an actual conflict of interest existed at trial.

(TR Belated Appeal, “Order on Remand from Kentucky Court of Appeals (As to ‘Conflict of Interest’ Issue),” 45).

The trial court correctly found that Appellant had not raised an actual conflict at trial and correctly held that no actual conflict existed. (*Id.* at 45-46). The conclusion by the trial court, Ms. Keeley, and Mr. McNeill that there was no conflict was the correct one. The subsequent Court of Appeals opinion that affirmed the trial court’s ruling was also correct.

For purposes of the Sixth Amendment, an “actual conflict” is a conflict of interest that adversely affects a lawyer’s performance. *Mickens v. Taylor*, 535 U.S. 162, 172 (2001). In *Holloway v. Arkansas*, 435 U.S. 475, 487 (1977), the United States Supreme Court noted that the trial court may inquire into the basis of a claim of a conflict of interest. In *Beard v. Commonwealth*, 302 S.W.3d 643, 647 (Ky. 2010), the Supreme Court of Kentucky held that when the defendant raises the conflict issue at trial, “...the proper inquiry then is whether Appellant raised an actual conflict at trial...”. The defendant must show that an actual conflict exists.

In *Beard*, a lawyer represented a defendant at trial charged with making undercover drug sales to a confidential informant. The same lawyer also represented that confidential informant, who was on probation, and who made the drug buys from the defendant. According to the terms of his probation, the informant was not supposed to be working undercover with the police. The informant faced probation revocation, but the revocation hearing was held in abeyance, apparently so the Commonwealth could determine how the informant performed as a witness in the trials of drug cases. At trial,

the defendant's lawyer asked the informant why he had not told the police he was on probation, and the informant responded that he did not know that he was on probation. This Court pointed out that the defendant's and the informant's proceedings had become "inextricably intertwined" because the informant was testifying against the defendant, and the informant's performance as a witness would have a direct effect on the informant's revocation proceedings. This put the lawyer in a situation where he could either attack the informant on the witness stand and discredit him, or he could go easy on the informant in hopes of improving the informant's chances of escaping probation revocation at his upcoming revocation hearing. Either way, the lawyer would be helping one client at the expense of another.

The Beard scenario is quite different from Appellant's case, as Gravett was not working for the police and the outcome of the assault trial would not have any affect on his own proceedings, as his effort for shock probation did not depend on the outcome of Appellant's trial, and Gravett had already lost his bid for shock probation. Gravett's Paducah DPA attorney, John Johnson, testified that he did not negotiate with the Commonwealth about Gravett's testimony against the Appellant, and did not discuss the ear biting assault case with Gravett. (VR 9/23/11; 15:37:25-15:39:25). As the verdict in the assault case would not affect Gravett's situation and Gravett's unsuccessful attempt for shock probation did not affect the assault trial, there is no showing of a conflict to Appellant by being represented by Ms. Keeley of the Paducah DPA office under these facts. Mr. McNeill correctly assessed the situation by noting that the representation of Gravett by DPA was not directly adverse to Appellant, as the cases for each were

unrelated. (VR 9/23/11; 15:18:05-15:19:52). This was a recognition that Gravett's cases for credit card fraud, identity theft, promoting contraband and PFO were unrelated to Appellant's assault case.

SCR 3.130(1.7) governs "Conflict of interest: current clients." A lawyer is prohibited from representing a client under SCR 3.130(1.7)(a)(1), (2) if the representation "involves a concurrent conflict of interest." A concurrent conflict exists when representing one client would be "directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

For SCR 3.130(1.7) purposes, there was nothing "directly adverse," and there was no "significant risk" that representation of Appellant and Gravett would be "materially limited" by a responsibility to another client or former client.

Further, Mr. Johnson testified that after filing the shock probation motion on Gravett's behalf, he did not do anything else for him. (VR 9/23/11; 15:37:10). Gravett's shock motion had been overruled eight (8) days prior to Appellant's trial. There were no extant legal proceedings for Gravett that could conflict with Appellant's trial. SCR 1.130(1.7) did not bar Ms. Keeley from representing the Appellant.

Whether a client is current or former is important. This was noted in Beard v. Commonwealth, *supra*, in which this Court dealt with the case of an attorney who was currently representing both the defendant and a witness against the defendant at trial. Finding a problem with this arrangement, this Court stated, "Thus, this case is different

from one in which defense counsel has only previously represented the adverse witness.” Beard, at 647. This indicates that the status of the representation is relevant to the determination of a conflict.

SCR 3.130(1.9)(c) also provides that a lawyer who formerly represented a client shall not “...(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.” No information related to the prior representation of Gravett was used to the detriment of Appellant as Mr. Johnson and Ms. Keeley did not discuss either client with one another at any time.

Regardless, Appellant seeks to impute an alleged conflict on the part of another DPA attorney to Ms. Keeley. Appellant argues that since another lawyer in the Paducah DPA office represented the victim Gravett, that there is a conflict of interest on the part of that counsel that should be imputed to the entire Paducah DPA office, and therefore prevent Ms. Keeley from representing Appellant. This contention is based on SCR 3.130(1.10), “Imputation of conflicts of interest: general rule.” This rule applies to prevent lawyers in the same firm from representing a client when any one of them practicing alone would be barred from such representation under SCR 1.7 or SCR 1.9.

Ms. Keeley stated during the pretrial hearing that she believed DPA still represented Gravett, but she had not checked his status lately. The April 13, 2009 document states that DPA “represented Gravett” on numerous occasions, and most

recently he was sentenced on April 8, 2009, which signals that the representation of Gravett by DPA was completed.

Under SCR 3.130(1.9), regarding former clients, there has been no showing that the jailhouse ear-biting incident was a substantially related matter to Gravett's criminal charges on which DPA counsel represented him, and no showing that confidential information from that representation was used. Certainly under the standard of SCR 3.130(1.9) regarding former clients, there has been no showing of a conflict and therefore nothing to impute to Ms. Keeley.

No actual conflict has been demonstrated in Appellant's case, as required by both Holloway and Beard. Appellant having failed to show that there was an actual conflict, the trial court correctly decided there was no reason Ms. Keeley could not represent Appellant at trial, and the Court of Appeals correctly affirmed the trial court's rulings.

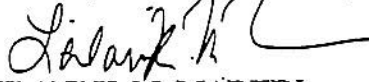
CONCLUSION

The Commonwealth respectfully requests that this Court affirm the ruling of the Kentucky Court of Appeals and deny Appellant the relief he requests in this appeal.

Respectfully submitted,

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